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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CONRAD VELEZ, JR., Defendant and Appellant.	A149708 (Lake County Super. Ct. No. CR934612)

Defendant Conrad Velez, Jr. pled no contest to two counts of murder in exchange for a 50-year sentence and dismissal of the remaining charges and enhancements. He now challenges the validity of his plea on the basis that the degree of murder was neither charged nor knowingly accepted and approved as part of his plea agreement. He also claims he was never fully and adequately told of the consequences of his plea or that it was not part of a package agreement involving leniency for his son who was a co-defendant. Finally, he alleges his counsel was ineffective for his failure to advise Velez that his plea agreement was not part of a package agreement. None of his claims have merit. We affirm.

I. FACTS

Following a preliminary hearing, Velez and his son were charged in an amended information with the murders of William Busch and Ed Morgan. The first amended information also charged Velez with nine other felony counts, including arson, assault with a deadly weapon, assault likely to produce great bodily injury, taking and unlawfully driving a vehicle, and carjacking. The amended information alleged that the murder of

Morgan was committed during a carjacking or robbery, and also alleged a multiple murder special circumstance under section 190.2 subdivision (a)(3).[1]

Velez's girlfriend was also a participant in the crimes. She was charged with two counts of being an accessory to murder, and with a single count of vehicle theft.

Velez pleaded no contest to two counts of murder with an agreement that he be sentenced to a 25-year-to-life term for each count to run consecutively. In exchange, the prosecutor agreed to dismiss the remaining nine counts and special allegations.

When it took his plea, the court confirmed that Velez initialed and signed the plea form that stated he was waiving his constitutional rights to a jury trial and to confront witnesses, remain silent, and present a defense. Velez acknowledged on the form that he had discussed his constitutional and statutory rights, the facts of his case, the elements of the charged offenses, any defenses available, the consequences of his plea, and anything he thought might be important to his case with his attorney. Velez also confirmed no one made any promises other than those listed in his plea form. Before accepting the plea, the court asked Velez whether he had enough time to talk with counsel about the case and whether his counsel answered all his questions. Velez replied affirmatively to both questions.

Velez moved to withdraw his plea a few months later. But he withdrew his motion after the hearing and before the court had ruled on it. Velez was sentenced in accord with his plea agreement to two consecutive 25-year-to-life terms. His appeal is timely.

II. ANALYSIS

A. Failure to Specify First-Degree Murder

Velez claims his plea must be vacated on several grounds because it did not explicitly specify the degree of his murder convictions.

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. [Citations.] 'The fundamental goal of contractual

[1] Unless otherwise stated references to statutes are to the Penal Code.

interpretation is to give effect to the mutual intention of the parties. (Civ.Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ.Code, § 1638.) On the other hand, "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." [Citations.]' [Citation.] 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. (Civ. Code, §§ 1635-1656; Code Civ. Proc., §§ 1859-1861, 1864; [citations].)' " (*People v. Shelton* (2006) 37 Cal.4th 759, 767.)

Here, the circumstances of Velez's plea agreement leave us with no reasonable doubt that he pled to anything other than first-degree murders. The agreement specifies counts one and two as violations of "PC 187(a)" with a penalty of "25 [years to]-Life" for each count, and a total prison sentence of 50 years to life. All other charges and enhancements were dismissed. First-degree murder carries a custodial term of 25 years to life. Second-degree murder is 15 years to life. (§ 190.[2]) The agreed-upon sentence thus clarified that Velez was pleading guilty to two first-degree murders to be sentenced consecutively. At the sentencing hearing, the court made clear that Velez was guilty of and being sentenced for two first-degree murders. Velez voiced no objection.

The allegations in the amended information also make clear, contrary to Velez's claim in his opening brief, that he was charged with first-degree murders. The murder of Morgan was alleged to have occurred during a carjacking or a robbery. There was also a special circumstances allegation of multiple murder. Section 190.2 subdivision (a) provides that "[t]he penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without parole" when a special

[2] Section 190 permits a 25-year-to-life or life without parole sentence for second-degree murder when the victim is a peace officer. This factor has no application in this case.

circumstance is proven. An accusatory pleading need not specify the degree of murder to adequately apprise of the accused of a first-degree murder charge. (See *In re Walker* (1974) 10 Cal.3d 764, 781.)

The trial court had the authority to accept or reject Velez's no contest plea, but it did not have authority to deviate from the agreed-upon sentence. (*People v. Segura* (2008) 44 Cal.4th 921, 931.) Here, the agreed-upon sentence was 25 years to life for each count of murder. Because the court also had no authority to impose a sentence that is not authorized by law (*People v. Jackson* (1981) 121 Cal.App.3d 862, 869), each of the murders was necessarily in the first degree.

Velez's plea agreement to consecutive terms for first-degree murder afforded him the benefit of avoiding a sentence of life in prison without possibility of parole. Although Velez argues this was no real benefit to him because 50 years to life is de facto life without the possibility of parole for a 43-year-old man, we will not discount the possibility of parole nor the potential benefit that can flow from his plea. Section 3055, enacted in 2017, provides that inmates over age 60 who are serving lengthy determinate or indeterminate sentences, but not life without parole, will be eligible for parole release consideration once they have served 25 years of incarceration on their current sentence. (§ 3055.) Velez has been incarcerated continuously since his arrest in February 2014 when he was 41 years old. Pursuant to section 3055, Velez will be eligible for parole consideration when he is 66 years old and has served 25 years of his term.

Under the circumstances, we have no doubt Velez entered no contest pleas to two counts of first-degree murder. Because the statutory penalty for first-degree murder is 25 years to life, and the amended information provided sufficient notice to Velez that he was facing first-degree murder charges, his claim that the trial court was required to make further findings of fact under the rule announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466 before it could impose the agreed-upon sentence has no merit.

Similarly, there is no merit to Velez's claims that his plea was an ineffective waiver of his rights to a jury trial or proof beyond a reasonable doubt because his

agreement did not specify the degree of murder. There is no question on this record that Velez entered pleas to first-degree murder and his waivers addressed his plea.

B. Factual Basis for First-Degree Murder Was Sufficient

Velez contends the trial court committed procedural error by accepting the parties' stipulation that the preliminary hearing transcript provided a factual basis for his plea to two counts of first-degree murder. Because a trial court possesses wide discretion in determining whether a factual basis suffices for a no contest plea, we will only reverse a conviction based on a no contest plea for abuse of discretion. (*People v. Palmer* (2013) 58 Cal.4th 110, 118-119 (*Palmer*).) We limit our review to the legality of the court's proceedings as Velez cannot appeal from a plea of no contest based on the sufficiency of the evidence. (§ 1237.5; *Palmer, supra*, 58 Cal.4th at p. 114.)

Section 1192.5 requires the trial court to inquire about a factual basis for a no contest plea to ensure the constitutional standards of voluntariness and intelligence are met. (*Palmer, supra*, 58 Cal.4th at p. 118.) "[A] trial court may satisfy its statutory duty by accepting a stipulation from [defense] counsel that a factual basis for the plea exists without also requiring counsel to recite facts . . . where, as here, the plea colloquy reveals that the defendant has discussed the elements of the crime and any defenses with his or her counsel and is satisfied with counsel's advice." (*Ibid*.)

"If the trial court inquires of defense counsel regarding the factual basis, counsel may stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript or written plea agreement." (*People v. Holmes* (2004) 32 Cal.4th 432, 442.) Even where no adequate inquiry is made, "[a] finding of error under this standard will qualify as harmless where the contents of the record support a finding of a factual basis for the conditional plea." (*Id.* at p. 443.)

Velez bases his argument largely on the fact that the judge who took his plea was not the same judge who conducted his preliminary hearing. Thus, he says, "the court could not have found a basis in the transcript of the preliminary examination, which it did not read." Moreover, he says, "[i]f it had read the transcript, it would have been difficult

for it to 'satisfy itself' that there was a factual basis for admission or finding of first degree murder." We disagree.

We know of no court that has held a judge errs by accepting the proffer of a preliminary hearing transcript as the factual basis for a conditional plea. Neither has Velez identified any such authority. Nevertheless, the transcript of the preliminary hearing contains evidence from which a reasonable court could conclude Velez committed two unprovoked and unmitigated acts of homicide that could have been first degree murder. Velez's son testified that Velez struck Busch in the head with a hatchet while Busch was seated on a bed, and that Velez clubbed Morgan from behind while riding in the backseat of Morgan's car. Neither act appeared provoked or preceded by any argument. The trial court was not required to find more than "a prima facie factual basis for the charges." (*People v. Holmes, supra,* 32 Cal.4th at p. 441.) Both acts provide a prima facie factual basis for first degree murder. Moreover, the factual basis inquiry can be satisfied as late as the sentencing hearing. (Cf. *People v. Coulter* (2008) 163 Cal.App.4th 1117, 1122.) Here, the trial court explicitly sentenced Velez to two counts of first-degree murder. The trial court did not abuse its discretion in accepting the preliminary hearing transcript as the factual basis for his plea.

C. Consequences of the Plea

Velez argues that his due process rights were violated because he was neither informed nor aware of the consequences of his plea in three respects. He was not clearly told his 25-years-to-life sentences were consecutive because in taking the plea the court said they "could" rather than they "would" be consecutively imposed. He was not told he was subject to a mandatory period of parole following service of his sentences. He was not told he was ineligible for good behavior or program participation sentence reduction credits.

Before accepting a plea of guilty or no contest, a court must admonish the defendant of the constitutional rights being waived and the direct consequences of the plea. (*People v. Walker* (1991) 54 Cal.3d 1013, 1020 (*Walker*), overruled on another

ground in People v. Villalobos (2012) 54 Cal.4th 177, 183.) However, advisement of the consequences of a plea is not constitutionally mandated, and any such error is waived absent an objection at or before sentencing. (*Id.* at pp. 1022-1023; *People v. Villalobos* (2012) 54 Cal.4th 177, 181-182.) Here, Velez voiced no such objection at his change of plea hearing or sentencing. Thus, this claim is forfeited. (*Walker*, *supra*, 54 Cal.3d at pp. 1022-1023.)

Velez's arguments also fail on the merits. "[A] defendant who has pleaded guilty after receiving inadequate or erroneous advice from the trial court with regard to the potential consequences of a plea generally is entitled to obtain relief only by establishing that he or she was prejudiced by the erroneous advice, i.e., by establishing, in the present context, that but for the trial court's erroneous advice . . . the defendant would not have entered the guilty plea. Absent such a showing of prejudice, a defendant who has received erroneous advice . . . can obtain relief only if the . . . imposed [term] conflicts with a specific, negotiated term of the plea agreement." (*In re Moser* (1993) 6 Cal.4th 342, 345.)

Here, any possible failures were not prejudicial. Velez's argument that the court misstated the consecutive nature of his sentences is specious at best. His plea agreement specified a custodial term of 50 years to life consisting of two consecutive 25-year-to life sentences. While the court incorrectly stated that Velez "could" rather than "would" be sentenced to 50 years in custody, it is entirely unreasonable in light of his plea to conclude Velez understood he would be sentenced to anything other than 50 years to life. Moreover, at the hearing to withdraw his plea, Velez acknowledged he understood he would be sentenced to 50 years to life.

The court's failure to inform Velez of his ineligibility for work or good behavior sentence reduction credits was not error. Although the plea agreement did not address Velez's credit earning capacity during sentencing, our Supreme Court has held that a defendant's credit earning capacity is an indirect consequence of a plea and that advisement of such matter is not required to facilitate a knowing and voluntary decision to plead. (*People v. Barella* (1999) 20 Cal.4th 261, 271-272.) Velez is therefore not

entitled to withdraw his plea based on the court's failure to advise him of his ineligibility for good-time and work-time credits. (*Id*. at p. 272.)

Velez's claim that he was never aware he would be required to serve a mandatory parole term following service of his sentence is readily disposed of. At the time he entered his plea, Velez understood that he was facing 50 years in prison. In the hearing to vacate the plea, he testified that he assumed he would not be paroled until he was 95 years old. We can leave aside whether or not that is a valid assumption. The point is there is no reason to conclude that Velez would not have entered his plea had he known he would be released to parole following his execution of sentence. It borders upon preposterous to consider this omission prejudicial.

Velez's arguments based upon the trial court's failure to inform him of the consequences of his plea were both procedurally forfeited and are without merit.

D. Package Deal

Finally, Velez contends his plea agreement was coerced because it was part of a package deal requiring him to plead no contest in exchange for agreements to immediately release his girlfriend and son. Alternatively, Velez claims his plea was not knowing and intelligent because he incorrectly believed it was part of a package. The attorney general argues this issue is procedurally defaulted, and even if it is not, Velez loses on the merits.

Background

When Velez changed his plea, the trial court asked whether Velez's plea was part of a global resolution. The prosecutor replied, "not really." Defense counsel added that the plea deal had not been "represented [to him] as such." The trial court also asked Velez whether any promises not mentioned in the plea agreement had been made to him in exchange for his plea. Velez answered "no" and never mentioned that he believed his girlfriend and son would be released immediately if he pleaded no contest. Velez's change of plea form also contained an acknowledgment that "[n]o one ha[d] . . . made any promises to [him] except as listed in th[e] form."

Two months after his plea was accepted, Velez was assigned new counsel and moved to withdraw his plea. Velez argued the plea was involuntary because Velez was misinformed about whether his plea was part of a package deal. In support of the motion Velez filed a declaration in which he stated that his counsel told him that his son and girlfriend would be released if he accepted the prosecution's offer, but not if he rejected it. Velez decided to plea based upon this representation, and later learned it was not true.[3]

The prosecutor filed a declaration opposing the motion that stated that while the agreement was never represented to Velez as a package, it was in the sense that his son received a very favorable resolution in light of Velez's plea. The son would not have received such an offer if Velez had not pled. The resolution of Velez's girlfriend's case had nothing to do with the terms of his plea. She was nearing the maximum time in custody she could have been assessed on her pending charges. But the leniency for Velez's son in light of his acceptance of the prosecutor's offer was implicit in his plea agreement.

The court conducted a hearing at which Velez and his former defense attorney testified. Velez testified that he believed his co-defendants would go home the day of the plea hearing if he accepted the deal. But he was never told the People's offer was part of a package.

His former defense counsel testified that he told Velez if he accepted the prosecution offer his son and girlfriend would be released that day. He also testified that during the change of plea hearing Velez asked him whether the offer was part of a global resolution. Counsel told Velez he did not know what the prosecutor was thinking, but that he would protest if Velez's son and girlfriend were not released. When counsel was asked why he did not state on the record that he believed the deal was part of a global offer, he testified that he did not think it was import to denominate the deal in any

[3] It appears Velez's son and girlfriend entered pleas the same day as Velez and were released.

particular term. He knew if Velez entered his plea, his son and girlfriend would be released. So, he did not worry about whether it was a global resolution.

Velez withdrew this motion before the court issued its decision and was sentenced two months later.

Analysis

"An appellate court will not consider claims of error that could have been—but were not—raised in the trial court." (*People v. Vera* (1997) 15 Cal.4th 269, 275.) The attorney general argues that Velez's claim that he was improperly goaded into a package plea agreement is procedurally defaulted because his motion to vacate the plea was withdrawn from the court's consideration. We agree.

Velez argues that we should "look below the surface of [his] decision to withdraw his motion [seeking to set aside his plea]" because his withdrawal "was coerced by the prospect that the generous disposition [to his co-defendants] would be rescinded." Velez cites no evidence supporting this assertion, and we see none in the record. Our consideration of whether or not Velez improperly agreed to a package plea agreement is procedurally barred. Moreover, the claim is without merit, and so too is his alternative argument that he mistakenly thought his plea was part of a package agreement. "It has long been established that guilty pleas obtained through 'coercion, terror, inducements, subtle or blatant threats' are involuntary and violative of due process." (*In re Ibarra* (1983) 34 Cal.3d 277, 287 (*Ibarra*), disapproved on another ground in People v. Howard (1992) 1 Cal.4th 1132, 1175-1178.) "Such coercion is a particular danger in the package-deal plea bargain context." (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 124-125.) A package deal is an all-or-nothing proposition; it refers to an offer by the prosecution that provides a defendant an opportunity to plead to a lesser charge, and receive a lesser sentence, on the condition that all codefendants plead guilty. (*Ibarra*, *supra*, 34 Cal.3d at p. 286.) But a package deal plea offer is not per se invalid. Instead, the trial court considers the totality of the circumstances in deciding "whether, in fact, a plea has been unduly coerced, or is instead freely and voluntarily given." (*Ibarra*, *supra*, 34 Cal.3d at pp. 287-288.)

"A plea may not be withdrawn simply because the defendant has changed his mind." (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1457.) "The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty." (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

The record of Velez's motion to withdraw his plea does not reflect that the prosecution offered a package deal for all defendants in this case. At most the record reflects a subjective understanding by Velez and his counsel that his son would receive a favorable resolution if Velez accepted the offer of two first-degree murders. Even in light of this understanding the plea was not impermissibly coercive.

The factors that guide us in reaching this determination are the same as those that are to guide the trial court: (1) was there proper inducement for the plea, including whether the prosecution had a reasonable and good faith case against the third party who was offered leniency; (2) whether there was a factual basis for the guilty plea and the sentence was commensurate with the defendant's culpability; (3) the nature and degree of coerciveness; (4) whether the promise of leniency was a significant consideration in accepting the deal; and (5) other factors such as the defendant's age and experience, the party who initiated the plea discussions, and whether charges had already been brought against the third party. (*Ibarra*, *supra*, 34 Cal.3d at pp. 288-290.)

Applying these factors, we conclude that even if Velez mistakenly thought he was presented a package offer, he has not shown his will was overcome and his plea was involuntary. A permissible inducement for Velez's plea was the agreed-upon sentence of two terms of 25 years to life, rather than life without parole that would arise from his conviction for the two murders with special circumstances and alleged enhancements. Moreoever, the record reflects the prosecution had a good-faith case against his son who was present and an accomplice in both of the killings. As we have already discussed in part II.B., *infra*, there was a factual basis for Velez's pleas to first-degree murder, and the agreed-upon sentences were proportionate to his involvement in the crimes. There is no question that at the time of his plea, Velez's counsel stated his son would be released on a

plea to lesser charges if Velez pled guilty. While this factor may have affected Velez's consideration in pleading guilty, the record is silent on how Velez's counsel learned of any offer to his son or when and how the prosecution extended it. There is also no showing of additional coercion by Velez's son, his girlfriend or their lawyers, other family members or the prosecution to support the claim that his will was overcome. Finally, Velez was 44 years old at the time of his plea, with a lengthy criminal record and prior terms in state prison.

There is no basis on this record to conclude that Velez has shown by clear and convincing evidence that his plea was not free or voluntary.

E. Ineffective Assistance of Counsel

Finally, Velez claims his counsel was ineffective because he failed to inform him that his plea was not part of a package agreement. To challenge a guilty plea due to ineffective assistance of counsel, Velez must show "not only incompetent performance by counsel, but also a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.)

This claim fails for the same reasons as we discussed in the previous section. Velez has not shown his plea was unduly affected by any promise of leniency toward his son.

III. DISPOSITION

Judgment is affirmed.

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Siggins, P.J.

WE CONCUR:

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Fujisaki, J.

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Petrou, J.